UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

BRENDA J. COOPER; et al. **PLAINTIFFS**

VS. **CIVIL ACTION NO. 4:16-CV-52-DMD-JMV**

MERITOR, INC.; et al. **DEFENDANTS**

DEFENDANTS MERITOR INC., THE BOEING COMPANY, AND ROCKWELL AUTOMATION, INC.'S REPLY IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE TETRA TECH'S FINAL EXPANDED SITE INSPECTION REPORT, REVISION 1

Meritor Inc., The Boeing Company, and Rockwell Automation, Inc. ("Defendants") submit this reply in support of their Motion *in Limine* to exclude Tetra Tech's April 2017 Final Expanded Site Inspection Report, Revision 1, Dkt. #618-2 (the "2017 Tetra Tech Report") attached to Plaintiffs' Response in Opposition to Defendants' Motion for Partial Summary Judgment on the Issue of Punitive Damages ("Plaintiffs' Opposition") (Dkt. #619, p. 4) and cited in or attached to other motions.[1]

SUMMARY

Plaintiffs' attempt to introduce the 2017 Tetra Tech Report under the "public records hearsay exception" of Fed. R. Evid. 803(8) fails. As a document wholly lacking the indicia of trustworthiness found in or associated with public reports that other courts have admitted, this Court should find Tetra Tech's report inadmissible under this hearsay exception. Defendants have demonstrated that circumstances of this contractor-produced report "indicate a lack of

[1] Plaintiffs cited to or attached the 2017 Tetra Tech Report as an exhibit to a number of motions. A complete list with corresponding docket numbers is incorporated by reference from Defendants' Memorandum at footnote 2. (Dkt. #707, p. 1.)

trustworthiness."[2] Fed. R. Evid. 803(8)(B). This Court has deemed a public report inadmissible when introduced without "any documents or surrounding circumstances that indicate the report's trustworthiness." *Hardy v. City of Tupelo, Miss.*, No. 1:08-CV-28-SA-JAD, 2009 WL 2136547, at *3 (N.D. Miss. July 10, 2009). For the reasons below, the same outcome as *Hardy* is appropriate here.

I. The 2017 Tetra Tech Report Is Untrustworthy and Thus Inadmissible Under Rule 803(8).

The three elements of the public records hearsay exception are (1) the person making the record has first-hand knowledge; (2) the person prepared the record pursuant to a duty authorized by law; (3) the record and surrounding circumstances indicate trustworthiness. *U.S. v Central Gulf Lines, Inc.*, 747 F. 2d 315, 319 (5th Cir. 1984). The circumstances surrounding development of the 2017 Tetra Tech Report in no way meet the third element. Defendants have carried their burden to show that the report is untrustworthy, and, therefore, this Court should not admit it.[3] *See e.g.*, *Bingham v. Jefferson Cty., Tex.*, No. 1:11-CV-48, 2013 WL 1312563, at *7 (E.D. Tex.

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[2] While not a blanket indictment of the entire company, the fact that two Tetra Tech employees were sentenced to prison for falsifying test results on a separate project, prompting Senator Nancy Pelosi to warn that "[a]ll federal agencies contracting with Tetra Tech should be made aware of the serious investigation underway regarding their work at Hunters Point, so that they can be on guard to safeguard against other potential fraudulent activities," surely raises a question of untrustworthiness. (Dkt. #707-5.)

[3] The Court also should refuse Plaintiffs' aside to take judicial notice of the report. Courts in the United States District Court in the Northern District of Mississippi have taken judicial notice of factual statements or documents developed solely under the control of a government agency, but have not allowed reports developed by outside consultants or of questionable trustworthiness. *See e.g.*, *Lipovsky v. Vilsack*, No. 414CV00047DMBJMV, 2016 WL 4919894, at *2 n.1 (N.D. Miss. Sept. 14, 2016) (taking judicial notice of a statement on a government website); *United States v. Bolivar Cty.*, No. 4:15-CV-165-DMB-JMV, 2016 WL 7471319, at *4 n.6 (N.D. Miss. Dec. 28, 2016) (taking judicial notice of the public agency's handbook). The cases relied upon by Plaintiffs allowed judicial notice of government records that are distinguishable from the unreliable report here. *Terrebonne v. Blackburn*, 646 F.2d 997, n.4 (5th Cir. 1981) (taking judicial notice of statistics collected by the government that were of unquestionable accuracy); *Burbank-Glendale-Pasadena Airport Auth. v. Lockheed Martin Corp.*, No. 10-CV-2392-MRP-AN, 2010 WL 11549874, at *2–3 (C.D. Cal. Aug. 24, 2010) (taking judicial notice of records that were properly authenticated and not opposed by either party).

Mar. 1, 2013) (noting that the court may admit a government report unless the opponent of the report meets their burden of showing it untrustworthy or assembled by unreliable methods).

II. The Report's Untrustworthiness Include Unsupported Assumptions and Numerous Deviations from the Data Quality Requirements.

The 2017 Tetra Tech Report, in locations too numerous to individually name here, misses the requirements for trustworthiness and reliability that are necessary to gain admission under the public records hearsay exception. *E.g.*, *Hawthorne Partners v. AT&T Techs., Inc.*, No. 91 C 7167, 1994 WL 63054, at *5 (N.D. Ill. Feb. 17, 1994) (declining to admit an EPA report that lacked "sufficient trustworthiness" required for admission under Fed. R. Evid. 803(8)). The demonstrably unsupported and misleading conclusions drawn by Tetra Tech are not only incorrect, but would be so prejudicial as to preclude admission under Fed. R. Evid. 403. *See Id.* at *6.

Plaintiffs' baldly state that "[t]he Tetra Tech report was generated by an investigation that was closely managed by the EPA," but provide sparse support, which, when properly evaluated, does not back this premise. (Dkt. #734, p. 9.) Following this statement, Plaintiffs state that EPA either analyzed the data at its own laboratory or that a laboratory of EPA's choosing did the analysis. (*Id.*, p. 5.) But the role of "selecting laboratories" has no bearing on the actual quality of the data and the written report that Tetra Tech produced using the data.

In truth, Plaintiffs have provided this Court with limited and, in several cases, patently incorrect information, that they claim shows trustworthiness of the report. Nothing in the 2017 Tetra Tech Report (or elsewhere) shows that EPA actually supervised the daily activities that Tetra Tech undertook to the produce the data, sampling, and report. Information on supervision of daily activities—such as sample collection, sample labeling and preservation, verification and review of laboratory reports and supporting quality assurance checks, and subsequent data entry

and report writing—is actually relevant to trustworthiness. There is no record related to EPA's supervision of these critical activities. Even more, no such records can be obtained at this late point in this case.[4] Instead, Defendants have demonstrated already that circumstances surrounding the development and later use of the sampling, data, and report demonstrate that it is not trustworthy.

A. EPA did not use the 2017 Tetra Tech Report data to calculate the HRS score for the Site.

Contrary to the Plaintiffs' statement to the Court, EPA's actual Hazard Ranking System ("HRS") Documentation Record and HRS score calculation did not rely on the data collected and described by Tetra Tech in the 2017 Tetra Tech Report.[5] EPA's reliance on indoor air data from the facility and its intentional exclusion of the Tetra Tech data in its HRS score illustrates why the Court should find the report irrelevant and prejudicial to these proceedings. *See O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1206 (8th Cir. 1990) (refusing to admit EPA reports under the public records hearsay exception that the court found to be "prejudicial, irrelevant, of no probative value"). Moreover, EPA's decision not to use the Tetra Tech report data as part of the HRS score calculation calls into question the Plaintiffs' misleading assertion that the report is trustworthy because EPA "apparently found it reliable enough to use it as the basis of the hazard ranking score." (Dkt. #674, p. 15.)

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[4] Pursuant to 40 C.F.R. Part 2, Subpart C, EPA employees are prohibited from testifying about information acquired in the course of performing their official duties or because of the employee's official relationship with the EPA, unless authorized. 40 C.F.R. § 2.402(b) (2000). The regulations apply to EPA employees but not EPA contractors. *See* 40 C.F.R. § 2.402; 40 C.F.R. § 3.102 (1996). Thus, contrary to their position, Plaintiffs could have deposed Tetra Tech employees and asked them questions to establish the trustworthiness of the report, but did not do so. Because discovery is now closed, Defendants are precluded from deposing the report's authors to examine them on the report's various failures.

[5] Additional technical information about HRS scores is available from the EPA on their website, Introduction to the Hazard Ranking System (HRS), https://www.epa.gov/superfund/introduction-hazard-ranking-system-hrs (last visited June 13, 2018). EPA uses one or more of the following four pathways to calculate HRS scores: groundwater migration, surface water migration, soil exposure (which includes a subsurface intrusion component), and air migration. *Id.*

The HRS Documentation Record (which documented EPA's scoring of the site for potential inclusion on the National Priorities List) does not calculate HRS scoring components for groundwater or surface water migration pathways (i.e., the data that Tetra Tech generated) and instead presents an HRS score limited to the subsurface intrusion pathway to indoor air at the Facility.[6] (*See* Exhibit A to the Exhibit 1, Declaration of Laura D. Heusel, HRS Documentation, HRS Documentation Record, p. 1.) In contrast, the 2017 Tetra Tech Report primarily[7] discusses the un-calculated groundwater mitigation pathway (Dkt. #618-2, pp. 22-29, "Section 6.0 Groundwater Mitigation Pathway") and the un-calculated surface water mitigation pathway (Dkt. #618-2, pp. 29-34, "Section 7.0 Surface Water Mitigation Pathway").

EPA's procedure for calculating the subsurface intrusion component score relied only on indoor air data collected in the Grenada Manufacturing Facility, a location that Tetra Tech's April and May 2016 sampling locations did not include. (*See* Dkt. 618-2, p. 15 (list of sampling locations for the two sampling events includes "source areas" around the perimeter of the Grenada Manufacturing building, but does not include the building's indoor air).) Thus, the Tetra Tech sampling data – none of which were collected at locations *inside* of the Grenada Manufacturing Facility's building and none of which EPA used to calculate the subsurface intrusion pathway score for its HRS analysis – are not relevant to EPA's process and thus do not fall under the Rule 803(8) exception. Not only did EPA not use the Tetra Tech report for the

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[6] The HRS score for the subsurface intrusion pathway is calculated from a formula that utilizes "likelihood of exposure," "waste characteristics," and "targets." Ex. A, p. 4. EPA did not utilize any of the Tetra Tech data to calculate the three components. (*See* Ex. A, pp. 37-46.)

[7] Tetra Tech did not address the subsurface intrusion pathway other than a cursory discussion in Section 2.3 of its report titled "2.3 Previous Investigations" that is based solely on data collected from sampling locations other than the Facility and also *not* collected by Tetra Tech. With no personal knowledge of this outside data, their statements concerning that data is hearsay within hearsay under Federal Rule of Evidence 805, which is not admissible unless each layer of hearsay is subject to an exception to inadmissibility. *E.g.*, *Gallion v. Hinds Cty., Miss.*, No. 3:12CV736-DPJ-FKB, 2014 WL 793347, at *6 (S.D. Miss. Feb. 26, 2014) (granting a motion to strike an autopsy report that contained hearsay within hearsay that could not be qualified under hearsay exceptions).

HRS scoring, but to Defendants' knowledge EPA is no longer using Tetra Tech in any way for its evaluation of the Facility.[8]

B. The primary focus of the 2017 Tetra Tech Report is soil and groundwater data from the Facility and a former disposal area, and it is not relevant to litigation concerning the Eastern Heights Neighborhood.

The purpose of the 2017 Tetra Tech Report was to "evaluate whether a site [limited to the Grenada Manufacturing Facility] has the potential to be included on the National Priorities List." (2017 Tetra Tech Report, Dkt. #618-2, p. 4.) Contrary to the Plaintiffs' attempt to exploit the report for its purposes related to the Neighborhood, the report is almost exclusively focused on a smaller area that excludes the Neighborhood, except for a limited discussion of a small number of samples collected in the Neighborhood. Tetra Tech, in accordance with EPA instructions, defined its investigation area as the "40-acre main facility, as well as an approximately 4-acre former disposal area [on Moose Lodge Road]." (Dkt. #618-2, p. 5.) This description is also stated in the excerpt from Dkt. #618-2, p. 5 as shown below:

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8 To Defendants' knowledge Tetra Tech is no longer a contractor to the EPA at the Facility.

2.1 SITE DESCRIPTION, ENVIRONMENTAL SETTING, AND OPERATIONAL HISTORY

GM is located in Grenada, Grenada County, Mississippi. Specifically, the geographic coordinates for the GM facility, as measured from the approximate center of the equalization lagoon, are latitude 33.804631 degrees north and longitude 89.800909 degrees west (Refs. 3, p. 33; 4) (see Figures 1 and 2 in Appendix A). The GM site, as defined in this ESI, includes the approximately 40-acre main facility, as well as an approximately 4-acre former disposal area (Rockwell International Moose Lodge Road Disposal Site [Moose Lodge]) located directly east of the main facility, along Moose Lodge Road (Refs. 5, p. 1; 6, pp. 1, 2, 3; 7, p. 16). The site is bordered to the north by Eastern Heights, a residential neighborhood, other residential properties, and vacant land; to the east and south by vacant land; and to the west by Riverdale Creek and agricultural land beyond (Ref. 5, p. 9) (see Figures 1 and 2 in Appendix A).

The GM site was constructed by Lyon, Inc. in 1961 and sold to Rockwell International Corporation (Rockwell) in 1966. Rockwell Automotive Division operated a wheel cover manufacturing facility on the

C. Tetra Tech inadequately supports various conclusions in its report, which are more accurately described as untrustworthy and scientifically unsupported conclusions.

The 2017 Tetra Tech Report is full of untrustworthy overstatements that are misleading and make broad generalizations without any supporting data. As discussed below, some of these statements are entirely contradicted by data, and, in one case, incorrectly state the origin of a soil gas sample. A paragraph offering Tetra Tech commentary on groundwater sample results in Section 8 of the report, which Plaintiffs quoted in their reply, illustrates multiple overstatements:

> Based on an investigation in the vicinity of MW-20, it was determined that a chlorinated VOC plume, consisting primarily of TCE and cis-1,2-DCE, was present at relatively high concentrations in deep ground water and at low concentrations in shallow ground water. Monitoring well MW-20 is located north of the equalization lagoon and adjacent to a residential neighborhood, Eastern Heights. The potential for a VI pathway to homes in the neighborhood was investigated because the ground water contamination is adjacent to and likely under Eastern Heights, just north of [Grenada Manufacturing]. Between 2013 and 2016, 27 soil gas and 23 sub-slab soil gas samples were collected from Eastern

> Heights neighborhood. These samples contained TCE above its calculated VISL of 16 ug/m^3.

(Dkt. #734, p. 4 (quoting Dkt. #618-2, p. 36) (emphasis added).)

Defendants' analysis of this and many other parts of the report, was submitted to EPA in a memorandum on November 15, 2017, and included an analysis from T&M Associates, Inc. to EPA dated November 14, 2017 (hereinafter "T&M memorandum"). (Dkt. #706-1.) As provided in the T&M memorandum, the quoted paragraph above presents an incorrect and thus untrustworthy analysis of groundwater data. The T&M memorandum addressed Tetra Tech's statement about the 27 soil gas samples and 23 subslab soil gas samples:

> Section 8.0 of the Report states "Between 2013 and 2016, 27 soil gas and 23 subslab soil gas samples were collected from the Eastern Heights neighborhood. These samples contained TCE above its calculated VISL of 16 ug/m^3." By stating that "these" samples contained TCE above its calculated VISL, the Report ***suggests that all soil gas and subslab samples contained TCE above its VISL, which is incorrect and misleading***. In fact, 72 subslab samples were collected, with ***only one*** unqualified detection of TCE (see subpart II.j). It is widely acknowledged (including by EPA) that the VI pathway in the neighborhood is incomplete and that the homes in the neighborhood are not affected by groundwater. ***If information regarding the VI sampling in the neighborhood is to be included in this Report, this section should be updated to accurately reflect the samples collected and the results of the testing***.

(Dkt. #706-1, p. 10 (emphasis added).) Also pertaining to subslab soil gas samples, the 2017 Tetra Tech Report incorrectly mislabeled a soil gas sample as a subslab soil gas sample.[9] (*Id.* at 8 ("Further, the Report incorrectly indicates a detection of TCE at 75 ug/m^3 in a subslab sample.").)

Thus, the paragraph relied upon by the Plaintiffs to support their position that this Court should consider it trustworthy and admissible simply is full of errors that the T&M memorandum

[9] A subslab soil gas sample is well-recognized to not be the same thing as a soil gas sample. Subslab soil gas samples are collected directly underneath the concrete slab of a structure for the specific purpose of identifying potential vapors beneath a building. Subslab samples are also collected differently than soil gas samples and EPA has established separate screening criteria for subslab samples.

addressed and discredited. Thus, Plaintiffs advancing of this misleading and untrustworthy basis calls out for the exclusion of the report.

Similarly, the T&M memorandum addressed the fact that the Tetra Tech report has serious flaws in its position concerning well MW-20. Tetra Tech described MW-20 as "adjacent" to the Eastern Heights Neighborhood and as indicating a potential for "a vapor intrusion (VI) pathway to homes in the neighborhood." (Dkt. #618-2, p. 13.) This description is an inference not supported by data, and it is directly contradicted by EPA's own fact sheets. For example, the U.S. EPA Fact Sheet #9 provides: "Consistent with previous results, EPA did not find that chemicals present in the groundwater were entering homes via vapor intrusion. An 8 to 12-foot silty clay layer underlies the neighborhood and appears to be preventing TCE vapors from coming up into the homes." (U.S. EPA Fact Sheet #9, at 1 (Apr. 2017), Dkt. #589-14.)

Also related to well MW-20, the T&M memorandum points out that "[m]ultiple lines of evidence indicate that CVOCs [chlorinated volatile organic compounds] present in groundwater beneath the southern portion of the neighborhood do not originate at the Site." (Dkt. #706-1, p. 8.) Yet, the Tetra Tech report, in its discussion of groundwater sampling data at MW-20 incorrectly implies that the CVOCs do originate from the Grenada Manufacturing Facility. (*See* Dkt. #618-2, p. 13 (noting immediately after a sentence about MW-20 sampling results that "[t]he potential for a VI pathway to homes in the neighborhood was investigated because the ground water contamination is adjacent to and likely under Eastern Heights").)

Especially notable for the report's untrustworthiness, the T&M memorandum also observed that the 2017 Tetra Tech report blatantly ignores "EPA's widely accepted conclusion to the VI investigation that the vapor intrusion pathway in the neighborhood is incomplete." (Dkt. #706-1, p. 8.) To add further support, the T&M memorandum clarifies that:

> Section 8.0 of the Report states, "Monitoring well MW-20 is located north of the equalization lagoon and adjacent to a residential neighborhood, Eastern Heights. The potential for a VI pathway to homes in the neighborhood was investigated because the ground water contamination is adjacent to and likely under Eastern Heights, just north of GM." This statement is similar to the one made in Section 2.3 (subpart II.g, above) and infers a connection between the Site plume and the neighborhood plume, ***which is not present. A thorough review of Site data confirms that groundwater from the Site is not a source of any groundwater contamination beneath the Eastern Heights neighborhood.***

(Dkt. #706-1, p. 10 (emphasis added).)

In sum, the 2017 Tetra Tech Report is untrustworthy because it contains the misleading and contradictory overstatements described above, along with others not mentioned here for sake of repetition and judicial economy, but that are in the T&M memorandum. Given these objective problems, this Court should find that the Tetra Tech report is an untrustworthy document that should not be admitted into evidence pursuant to the public records exception to the hearsay rule.

D. Numerous deviations from EPA's required quality assurance protocols make the 2017 Tetra Tech Report untrustworthy.

Plaintiffs' blindly rely on the 2017 Tetra Tech Report statements that Tetra Tech followed quality assurance project plans ("QAPPs") and other quality assurance procedures, and implies that only a handful samples did not meet the protocols. (*E.g.* Dkt. #618-2, pp. 15-16 (stating that "[a]ll soil, wetland, ground water, surface water, sediment, and soil gas samples were collected in accordance with the EPA Region 4" procedures and listing only a few deviations from quality assurance protocols related to sample ***locations*** while failing to list deviations documented in logbook notes and field sheets and significant ***data quality issues***).) Plaintiffs make much of the fact that there were some changes in sampling locations and suggest these changes were the only notable deviations from quality assurance protocols. (*See* Dkt. #734, p. 5.) However, in light of the extensive failures to meet quality assurance protocols,

neither Tetra Tech's textual claim in the report nor Plaintiff's claim regarding minimal quality assurance deviations are true.

The T&M memorandum highlighted the serious, large number of data quality issues that actually occurred, over 100 in total. For example, 10 out of 11 groundwater samples collected by Tetra Tech were incorrectly purged, resulting in "turbidity"[10] in the sample waters that far exceed the limit of 10 nephelometric turbidity units ("NTU") that is required in EPA's standard operating procedures for groundwater sampling. (Dkt. #706-1, p. 11.) The T&M memorandum explains the consequences of ignoring the standard quality assurance procedures for purging groundwater samples:

> Section 6.5 of the Report states, "Ground water samples collected off site during the ESI contained cis-1,2-DCE, TCE, arsenic, beryllium, chromium, and lead. These same contaminants have been detected in ground water samples collected from monitoring wells throughout the GM site as part of GM's annual monitoring program." This statement attempts to connect the Site and the neighborhood by inference rather than an accurate evaluation of the data. It is correct to state that cis-1,2-DCE and TCE are detected in groundwater at the Site and in the neighborhood, but the Report fails to indicate that the plumes are separate and derive from different sources. Further, metals present in groundwater samples, in the neighborhood or on-Site, are likely a result of sediment in the sample rather than metals in groundwater. These metals are naturally occurring in the soil and aquifer sediments throughout the region. When sediment is excluded from a groundwater sample, the results for monitoring wells at the Site and the surrounding area is that no hazardous metals are detected (except for hexavalent chromium in areas where the on-Site source remains). This would most likely have been the case for the neighborhood groundwater samples collected for this Report, had the samples not contained significant sediment. ***The EPA Region 4 SESD SOP for groundwater sampling (SESD, 2013) indicates a turbidity limit of 10 NTU for sample collection and this limit was achieved for only one of the 11 groundwater samples collected.*** Notably, the single sample that met the turbidity target (GM-EH-12-GW1) was below detection limits for arsenic, beryllium, chromium and lead.

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[10] The United States Geological Survey defines turbidity as "the measure of relative clarity of a liquid," and explains that material that causes higher turbidity includes "clay, silt, finely divided inorganic and organic matter, algae, soluble colored organic compounds, and plankton and other microscopic organisms." The USGS Water Science School, https://water.usgs.gov/edu/turbidity.html (last visited June 13, 2018).

(Dkt. #706-1, p. 9 (emphasis added).)

Other examples of Tetra Tech's failure to follow QAPP procedures include (1) failure to follow requirements for sample preservation by freezing each one of 38 different soil and sediment samples. In reality, those arrived at the laboratory either "unfrozen or warmer than specified requirements," Dkt. #706-1, p. 12; and (2) exceedances of holding times (the maximum time allotted between sample collection and laboratory analysis) in 38 samples for volatile organic compounds, 10 samples for cyanide, and eight samples for mercury. *Id.* To document these preservation failures, Tetra Tech placed "qualifiers" in the data tables of the report, but in its assessment of the data and discussion within the report, Tetra Tech treated these sample results as if they were not qualified. (Dkt. #618-2, p. 17.) Quality assurance deviations of this magnitude, that are then ignored in documentation, are clear indications that the Tetra Tech Report is not trustworthy and not reliable as required by Federal Rule of Evidence 803(8)(B).

III. The Cases Relied on by Plaintiffs Do Not Address the Ultimate Issue of Trustworthiness.

Plaintiffs cite several cases in which courts have admitted public reports under the Rule 803(8), but none of those cases admitted a public record under the hearsay exception when there were significant allegations of untrustworthiness as here.

First, the remedial investigation report admitted in *United States v. Davis*, was "closely managed" by EPA. 826 F. Supp. 617, 621 (D.R.I. 1993). In *Davis*, to satisfy the trustworthiness requirements of the public record hearsay exception, EPA's remedial project manager for the site submitted an affidavit explaining that the majority of the samples were "reliably collected, analyzed, and reported." *Id.* at 623. The affidavit further explained that the variation of results in the soil samples at issue in the investigation was a usual result that would not invalidate the scientific acceptability and trustworthiness of the results. *See id.* at n.30. After noting that "EPA

has accepted, presented, and relied on this report as the final report," the *Davis* court concluded that the criticisms of the investigation's opponents were "minor" and "did not discredit the overall reliability of the report." *Id.* at 623-24.

In contrast to *Davis*, Plaintiffs offered the Tetra Tech Report without any affidavit or other supporting documentation to explain the significant deviations from the quality assurance protocols or the misleading statements and positions. Indeed, Plaintiffs have provided nothing more than speculation that the report was "closely managed" by EPA and that "EPA approved all data arising from the investigation." (Dkt. #734, p. 9.) This is difficult to accept given the unsupported overstatements and pervasive data quality issues that Defendants demonstrated above. Without more, Plaintiffs' bare statements fall far short of the affidavit and other indicia of trustworthiness provided by the report's proponents in *Davis*.

In another case cited by Plaintiffs, *Palmisano v. Olin Corp.*, the court admitted a site inspection report produced by a private contractor on behalf of EPA. No. C-03-01607 RMW, 2005 WL 6777560, at *3 (N.D. Cal. June 24, 2005). The *Palmisano* court had no need to analyze the inspection report for untrustworthiness because the challenger of the report did not allege any reasons to question its reliability. *See id.*

Finally, in *United States v. Tyson*, the court admitted a remedial investigation report prepared by an EPA contractor under the public records hearsay exception, finding that the report had been "scrutinized" by EPA. No. CIV.A. 84-2663, 1986 WL 9250, at *8 (E.D. Pa. Aug. 22, 1986). EPA oversight of the report included review by an EPA project manager and a separate review by EPA chemists and toxicologists. *Id.* After multiple reviews, the report was "handed back" to the consultant to verify data and refine its conclusions. *Id.* Even more, the analytical chemist at the laboratory that analyzed the samples used to generate the *Tyson*

investigation report testified in the proceedings. *Id.* Given those facts, the *Tyson* court presumably had little cause to question the trustworthiness and reliability of the report and concluded the report was admissible under the public records hearsay exception with minimal discussion. *See id.*

While it is true that government reports are generally admissible as trustworthy unless "sufficient negative factors are present," *Roberts v. Heating Specialist Inc.*, No. 3.12-CV-01820-SI, 2013 WL 1814894, at *3 (D. Or. Apr. 29, 2013), the general rule is not applicable here. Instead, unlike the reports in *Davis*, *Palmisano*, and *Tyson*, the lack of indicia of trustworthiness before this Court are compelling and collectively present an unquestionable example of untrustworthiness. The Court should find that the Tetra Tech Report is inadmissible hearsay due to its failure to meet the trustworthiness prong of the public records hearsay exception.

CONCLUSION

For the foregoing reasons, Defendants Meritor Inc., The Boeing Company and Rockwell Automation, Inc. respectfully request that the Court enter an Order, *in limine*, excluding Tetra Tech's April 2017 Final Expanded Site Inspection Report, Revision 1 attached to Plaintiffs' Response in Opposition to Defendants' Motion for Partial Summary Judgment on the Issue of Punitive Damages (Dkt. #618-2) and cited in and attached to other motions.

This the 15th day of June, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip Sykes, do hereby certify that I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing on all counsel of record.

SO CERTIFIED, this the 15th day of June, 2018.

/s/Phillip S. Sykes
PHILLIP S. SYKES